

February 18, 2025

By ECF

Honorable Kiyo A. Matsumoto
United States District Judge
United States District Court
for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: ***PHHHOTO Inc. v. Meta Platforms, Inc., et al.***, No. 1:21-cv-06159-KAM-LB

Dear Judge Matsumoto:

Plaintiff Phhhoto Inc. (“Phhhoto”) and Defendant Meta Platforms, Inc. (“Meta”) submit this joint status letter in response to Your Honor’s December 23, 2024 text Order [ECF 40]. The parties’ respective positions following the February 13, 2025 denial of Meta’s motion for rehearing and rehearing en banc are set forth below.

Phhhoto: Phhhoto respectfully requests that the Court set a date for a status and scheduling conference pursuant to Federal Rule of Civil Procedure 16. Phhhoto understands that Meta intends to renew its motion to dismiss for failure to state a claim, as well as potentially request supplemental briefing and seek to stay discovery. The Court properly should deny a renewed motion to dismiss for all of the reasons set forth in Phhhoto’s original opposition papers. As Your Honor observed at the first pre-motion conference, “but for the statute of limitations, it seems that the plaintiffs have a pretty good claim,” Mar. 10, 2022 Pre-Mot. Conf. Tr. 11:11-12, and supplemental briefing will not alter that. Indeed, since that time, the case law has become even clearer and more favorable to Phhhoto’s claims. *See, e.g., Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC*, 111 F.4th 337, 353-56 (4th Cir. 2024) (definitions of anticompetitive conduct and violation of Section 2 within a course of conduct, which must be analyzed as a whole).

Phhhoto filed its case on November 4, 2021, more than 39 months ago, and it is appropriate to begin discovery no later than the filing of Meta’s anticipated motion. Further delay not only risks lost witnesses and faded memories, but would only forestall the resolution of this matter, whether by the fact-finder or the parties.

Meta: Meta intends to request a pre-motion conference regarding Meta’s renewed motion to dismiss Phhhoto’s amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). In resolving Meta’s prior motion to dismiss, the Court did not reach Meta’s arguments that Phhhoto’s antitrust and state-law claims fail as a matter of law. *See* ECF No. 34 at 29 (noting “the Court need not decide whether Plaintiff has alleged sufficient facts to support its claims on the merits” because the claims were time-barred). As a result, those issues were not before the Second Circuit, which did not address them. *See Phhhoto Inc. v. Meta Platforms, Inc.*, 123 F.4th 592, 613 (2d Cir. 2024) (reversing only on statute of limitations grounds). Meta therefore

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intends to renew its motion to dismiss because Phhphoto's amended complaint fails to state a claim. In doing so, Meta anticipates requesting further briefing to address legal developments that post-date its prior motion to dismiss, including the D.C. Circuit's affirmance of the dismissal on the merits of a claim based in part on the same factual allegations that Phhphoto pursues in its complaint. *See New York v. Meta Platforms, Inc.*, 66 F.4th 288 (D.C. Cir. 2023).

Meta also anticipates moving to stay discovery pending the Court's resolution of its renewed motion to dismiss. Meta previously moved to stay discovery, *see* ECF No. 32, but soon after the Court dismissed Phhphoto's amended complaint without ruling on Meta's stay motion. There remains good cause to stay discovery because Meta's renewed motion to dismiss will be potentially dispositive, discovery will be costly and time-consuming, and a stay will not unfairly prejudice Phhphoto because Phhphoto stopped operating in 2017 and waited several years to file suit.

The parties stand ready to answer any questions and otherwise await the Court's direction.

Respectfully Submitted,

/s/ Scott Martin
Scott Martin
Counsel for Plaintiff
Phhphoto Inc.

/s/ Aaron M. Panner
Aaron M. Panner
Counsel for Defendant
Meta Platforms, Inc.